

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals CLERK
for the District of Columbia

APRIL TERM, 1934

No. 6210

539

CHARLES M. DOLEMAN

Administrator of the Estate of Robert R. Doleman

Appellant

VS.

HARRY LEVINE, an Individual

BRIEF ON BEHALF OF APPELLANT

NATHAN A. DOBBINS,
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Appellant

VS.

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BRIEF ON BEHALF OF APPELLANT

STATEMENT OF CASE

This case comes before the Court upon appeal from an order of the Supreme Court of the District of Columbia overruling the demurrer of the plaintiff below (appellant herein) and a judgment entered thereon in favor of the defendant. Robert R. Doleman, deceased, son of the appellant during his life time was an employee of the Potomac Electric Power Company and

was killed in the line of duty; that the widow of the deceased applied for, and is receiving compensation through the District of Columbia Workmen's Compensation Commission. That the Appellant, a next of kin and dependent of the said deceased, gave notice to the Deputy Compensation Commissioner of his election to proceed against the defendant, Harry Levine (appellee herein) pursuant to Section 933, Paragraph (a) of the District of Columbia Compensation Act; that the appellant then took out letters of administration upon the estate of the said deceased and on the first day of November, 1933, filed suit against the defendant, Harry Levine (appellee herein), in the amount of ten thousand dollars (\$10,000) for the wrongful death of the said deceased. That on the 13th day of November the Potomac Electric Power Company (not a party to the proceedings herein) also filed suit against the defendant, Harry Levine (appellee herein), in the amount of ten thousand dollars (\$10,000) for the wrongful death of the said deceased; allegedly pursuant to Section 933, Paragraph (b) of the District of Columbia Workmen's Compensation Act. To each of the aforesaid suits the appellee herein filed a Plea in Abatement whereupon the appellant and the Potomac Electric Power Company each filed demurrer to the said Plea in Abatement. The two demurrers being heard together in the Court Below on the second day of January, 1934; and on the 27th day of January, 1934, the Lower Court sustained the demurrer of the Potomac Electric Power Company, filed to the said Plea in Abatement and overruled the demurrer of the appel-

lant filed to the said Plea in Abatement. The ruling of the court being based upon the alleged application of the decision of the Supreme Court of the United States in the case of the

Aetna Life Insurance Co. vs. Moses,
287 U.S. 530.

*Appellant must
be dropped away
ca*

The Lower Court also indicated that in as much as the widow was the only dependent disclosed by the pleadings, the father not being alleged a dependent in the declaration, the aforesaid Supreme Court decision was controlling and gave the employer the right to maintain the action in preference to the administrator. Whereupon counsel for the appellant obtained leave of Court to file an amended declaration, which said amended declaration was accordingly filed and included an allegation to the effect that the appellant herein, was also a dependent of the said deceased within the meaning of Section 909, Paragraph (d) of the District of Columbia Compensation Act (Record p. 9). It was stipulated by and between counsel for the respective parties that the ruling of the Court would be the same if the amended declaration were filed and considered at the time of the decision on the original declaration of the appellant (Record p. 9).

ASSIGNMENT OF ERRORS

The errors committed by the Court are:

1. The Court erred in overruling the plaintiff's de-

murrer to the defendant's Plea in Abatement, and in entering judgment for the defendant.

2. The Court erred in its construction of paragraph (b) of Section 933, of the District of Columbia Workmen's Compensation Act (Act of Congress approved March 14, 1927, as amended by Act approved May 17, 1928, 45 Stat. At L. 600, C. 612; U.S.C.A. Title 33, Chapter 18).

3. The Court erred in holding that the acceptance of compensation by the widow of a deceased employee under Section 933 (b) of the District of Columbia Workmen's Compensation Act transfers the cause of action for wrongful death of said deceased to the employer even though the widow is neither the administratrix nor the only next of kin of said deceased, nor sole party or dependent entitled to compensation.

4. The Court erred in holding that a dependent of a deceased employee under the said District of Columbia Workmen's Compensation Act, who has properly elected to proceed against the third party responsible for the wrongful death of the deceased employee and has become administrator for that purpose, has no right to maintain the cause of action against the said wrongdoer where the widow has accepted compensation under the said District of Columbia Workmen's Compensation Act.

5. The Court erred in holding that the acceptance of compensation under the District of Columbia Work-

men's Compensation Act works as an assignment of the entire cause of action to the employer against the wrongdoer even though there is another dependent under the said Act, who is also the administrator and a next of kin of the said deceased employee, and who has properly elected to proceed against the said wrongdoer.

6. The Court erred in its Memoranda opinion, holding that the case of *Aetna Life Insurance Company vs. Moses* (287 U.S. 530) has given to the employer the right to maintain the cause of action against the wrongdoer where a person entitled to compensation has accepted same under the District of Columbia Workmen's Compensation Act.

STATUTES APPLICABLE TO THE QUESTIONS AT ISSUE

The sections of such statutes as are pertinent to a consideration of the questions presented upon this appeal are:

DISTRICT OF COLUMBIA WORKMEN'S

COMPENSATION ACT U.S.C.A.

TITLE 33, CHAPTER 18

Section 909. *Compensation for Death:*

"If the injury causes death, the compensation

shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding \$200.

(b) If there be a surviving wife . . . and no child of the deceased under the age of eighteen years, to such wife . . . 35 per centum of the average wages of the deceased, during widowhood . . . with two years compensation in one sum upon remarriage;"

(d) If there be no surviving wife or dependent husband or child under the age of eighteen years or if the amount payable to a surviving wife or dependent husband and to children under the age of eighteen years shall be less in the aggregate than $66 \frac{2}{3}$ per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent upon the deceased at the time of the injury, 15 per centum of such person until the age of eighteen years and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between $66 \frac{2}{3}$ per centum of such wages, and the amount payable as hereinbefore provided to surviving wife or dependent husband and for the support of surviving child or children."

Section 914. *Payment of Compensation:*

"(m) The total compensation payable under

this chapter for injury or death shall in no event exceed the sum of \$7,500."

Section 917. *Compensation a Lien Against Assets:*

"Compensation shall have the same preference of lien against the assets of the carrier or employer without limit of amount as is now or may hereafter be allowed by law to the claimant for unpaid wages or otherwise." . . .

Section 932. *Security for Compensation:*

"(a) Every employer shall secure the payment of compensation under this chapter. . . .

(1) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund

Section 933. *Compensation for Injuries Where Third Persons are Liables*

"(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.

"(b) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether

or not the person entitled to compensation has notified the deputy commissioner of his election.

“(c) [The payment of such compensation into the fund established in section 944 of this chapter shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as ‘representative’) to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

“(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceedings.

“(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise shall be distributed as follows:

(1) The employer shall retain an amount equal to:

(a) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney’s fee as determined by the deputy commissioner).

(b) The cost of all benefits actually furnished by him to the employee under section 907 of this chapter.

(c) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum, in excess of

such compensation, to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

“(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the commission of his election and institutes proceedings within the period prescribed in section 913 of this chapter, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the commission determines is payable on account of such injury or death over the amount recovered against such third person.

“(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval.”

Section 29, chapter 67 of the New York Compensation Law:

“If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, shall before any suit or any award under this chapter, elect whether to take compensation under this chapter or to pursue his remedy

against such other. Such election shall be evidenced in such manner as the commissioner may by regulation prescribe. If such injured person, or in case of death, his dependents, elect to take compensation under this chapter, the awarding of compensation shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation, and if he elects to proceed against such other, the state insurance fund, person, association, or corporation, or insurance carrier as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected and the compensation provided or estimated by this chapter for such case."

CODE OF LAW FOR THE DISTRICT OF COLUMBIA

"Chapter Forty-five,

Negligence Causing Death

SEC. 1301. Liability:

"Whenever by an injury done or happening within the limits of the District of Columbia the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured . . . to maintain an action and

recover damages, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured . . . ; and such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the widow and next of kin or such deceased person: *Provided*, That in no case shall the recovery under this act exceed the sum of ten thousand dollars”

SEC. 1302. By Whom Suit to Be Brought:

“Every *such* action shall be brought by and in the name of the personal representative of such deceased person, and within one year after the death of the party injured.

SEC. 1303. Distribution of Damages:

“The damages recovered in such action shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall inure to the benefit of his or her family and be distributed according to the provisions of the statute of distribution in force in the said District of Columbia.”

ARGUMENT

“Construction of the term ‘Person entitled to Compensation’ ”

We are met at the very threshold of the argument

with the question what is the legal construction of the term "person entitled to compensation" as employed in Section 933(a) of the District of Columbia Compensation Act? A clear and logical construction of this term is essential in determining the further question, who has the right of election under Section 933(a) of the District of Columbia Workmen's Compensation Act. The aforesaid section states that the person entitled to compensation may elect to proceed against the third person liable in damages by giving notice to the deputy commissioner, in such manner as the commission may provide; to accept compensation or to recover damages against such third person.

Here the deceased employee left surviving him as dependents under Section 909 of the District of Columbia Compensation Act a widow and a father. The widow electing to accept compensation under the Act while the father elected to proceed against the wrongdoer. Paragraph (19) of Section 902 of the District of Columbia Compensation Act on definitions provides:

"The singular includes the plural and the masculine includes the feminine and neuter."

The proper construction then of Section 933(a) Supra) is that the persons entitled to compensation may elect to accept compensation or proceed against the wrongdoer to recover damages. This being true how can the widow by accepting compensation trans-
 give the employer the exclusive right to maintain the
 fer the entire cause of action to the employer so as to

action? Is it not reasonable to conclude that under such circumstances the widow could only transfer such rights as she then possessed, which was one-half interest in the personalty of the deceased employee, under section 375 of the District of Columbia Code? Will reason lead us to conclude that where the right of election lies in two the action of the one is binding on the other? Suffice it then to say that the only right that Mary E. Doleman, widow of the deceased employee, transferred to the Potomac Electric Power Company was one-half interest in the personalty of the said deceased arising out of his wrongful death. This is unquestionably true especially in view of Section 933(b) of the said District of Columbia Workmen's Compensation Act which reads as follows:

“Acceptance of such compensation shall operate as an assignment to the employer of all right of *the person* entitled to compensation to recover damages against such third person.”

The said widow being the only one to accept compensation; naturally only the right of the widow was assigned to the Potomac Electric Power Company.

II

WHO HAS THE RIGHT TO MAINTAIN THE ACTION FOR WRONGFUL DEATH?

An exhaustive comparison of the various compensation laws throughout the land will reveal that Section 29 of the New York Workmen's Compensation

Law is most analogous to Section 933 of the District of Columbia Compensation Act. As a matter of fact the District of Columbia Workmen's Compensation Law was drafted after the New York Compensation Law.

See *Hunt vs. Bank Line*, 35 Fed. 2nd 136, 138

The New York Compensation Law is more far reaching than that of the District of Columbia, in that, when compensation is accepted under the New York Act the entire cause of action is transferred to the employer while under the District of Columbia Compensation Law only the right of *the person entitled to compensation* is transferred to the employer.

The question with respect to who may maintain the action for wrongful death has been decided by the Court of Appeals of New York on several occasions; that high tribunal gives this right to the administrator in preference to the employer.

Matter of Zirpola vs. Casselman, 237 N.Y. 367, 143 N. E. 222. In this case the facts showed that John Zirpola, while working for his employer, T. & E. Casselman, met his death by falling into an elevator shaft in a building owned by the corporation known as the estate of Eugene Hoffman. His father and mother, who were his sole next of kin, filed a notice of election under Section 29 of the Workmen's Compensation Act. The administrator brought an action at law which resulted in a verdict for two thousand five hundred dollars (\$2,500.00), and this, upon collection was divided equally between the next of kin, the father and moth-

er, one thousand and two hundred and fifty dollars (\$1,250.00) each in accordance with Section 1903 et 1905 of the Code of Civil Procedure. The claim for death benefits under the Workmen's Compensation Act was then brought on for hearing before the board. The decision of the board was that the mother was a dependent within the meaning of the Act but the father was not. The one thousand two hundred and fifty dollars (\$1,250.00) received by the mother as her share of the verdict would pay death benefits to her at the statutory rates for a period of 6 years 28 $\frac{2}{10}$ weeks. The board reduced the liability for benefits accordingly and made an award to the mother for compensation, beginning April 30, 1925, at the rate of four dollars and thirty-five cents (\$4.35) per week. Employer and carrier now urge that the deficiency should have been ascertained by deducting two thousand five hundred dollars (\$2,500.00), the full amount of the verdict.

Held: Cardozo, Justice:

P. 370:

“We think a cause of action for injuries resulting in death, prosecuted by an administrator against someone other than the employer, is for the benefit, not of the dependents as defined by the Workmen's Compensation Act, but of next of kin as defined by the Code (Section 1903, 1905) or by the decedent estate law continuing the Code provisions (Sections 133, 134). The two classes are not invariably nor perhaps commonly the same. A wife under the Workmen's Compensa-

tion, Section 16 receives 30 per centum of the average weekly wages of the deceased during widowhood with two years lump sum upon remarriage."

P. 371:

"The barest comparison of the class of dependents as established by this schedule with the class of next of kin as defined in the Statutory cause of action for injuries resulting in death will reveal the variance between them. If the cause of action against third parties has been transformed into one for the benefit of dependents, issues, at once novel and confusing will be injected into every trial. There will then be needed to ascertain whether the deceased was engaged in one of the hazardous occupations enumerated in the Statute (Workmen's Compensation Act, Section 3). If he was, there will arise the issue, often prolific source of controversy, whether the injury was 'one arising out of and in course of the employment.' Section 10.) If this appears to be its origin, a recovery otherwise permissible may be defeated or reduced. For an illustration the sole survivor may be a child who has reached the age of 18, or the survivors may be two children, one over the age and the other below the age, many similar situations may suggest itself."

P. 372:

"We think the cause of action against third parties for benefit of next of kin is unchanged by the Compensation Act except to the extent that the Act substitutes the carrier upon the execution of

appropriate assignments, to the distributive shares of next of kin who claim as dependents also. The Compensation Act did not create a new cause of action against wrongdoers other than the employer with a new class of beneficiaries. It found a cause of action already in existence, and assuming that this cause of action would continue in the future, it fixed the extent to which the shares that belonged to the dependents should be applied in reduction of the burdens that were placed upon the carrier.”

P. 375: The statute thus construed will work in practice the following results:

“(1) If dependents electing to assign are the only next of kin, the entire beneficial interest in the cause of action against the wrongdoer will pass by assignment to the carrier, who may sue or compromise at will.

“(2) If dependents electing to assign are members of the class of next of kin, but not all members of that class, their assignment will be effective to the extent of their beneficial interest and no farther, and the carrier, like any other beneficiary must prosecute through the administrator as the statutory trustee, and may compromise or release it.

“(3) If dependents who are next of kin elect not to assign, but retain their cause of action, they retain it with all of the incidents prescribed by the laws of its creation.

“(4) These dependents who are not next of kin and who are, therefore, without beneficial interest in the cause of action against the wrongdoer, are not put to an election since they have nothing to

elect.

The appellee is hereby challenged to meet the following argument: (1) Suppose the deceased employee left surviving him a widow, and two children under 18 years, and a child 19 years of age, should the children of the deceased employee under 18 years of age and the widow receive the deceased employee's personal estate to the exclusion of the child 19 years of age? (2) Suppose the deceased employee left surviving him an illegitimate child under 18 years of age that he recognized during his lifetime and a legitimate child 19 years of age, should the illegitimate child take to the exclusion of the legitimate child? Did Congress by implication intend to institute such a repeal of the District of Columbia Lord Campbell's Act?

The New York Court of Appeals again has dispelled any such conclusion. That most reputable Court speaking through Justice Pound in the case of

U. S. Fidelity & Guaranty Company vs. Graham
& Norton Company, 254 N.Y. 50,

spoke as follows:

“Edward Streeter died as a result of an accident arising out and during the course of his employment alleged to be due to the negligence of another not in the same employ. He left a widow and six children. Five of the children were included in the group of dependents under the age of 18, who, with the widow came under the protection of the Workmen's Compensation Act (Consol. Law C. 67). The sixth child, although belonging to the group of next of kin, did not

come within the group of dependents protected by the Workmen's Compensation Law. The widow and five children, as was their right, elected to accept compensation rather than to pursue the statutory remedy through the appointment of an administrator against the alleged wrongdoer. They received an award which has been paid. The result was an assignment to the insurance carrier of their beneficial interest in such cause of action. The insurance carrier thereupon brought this action in its own name and right against the alleged wrongdoer to recover the interest of the widow and dependent children, only in such a recovery as an administrator might have secured had one been appointed and instituted suit."

Held:

"The authority of the Zirpola Case was not impaired by the later decision in the Staten Island Case (251 N.Y. 127, 167 N. E. 194). The action should have been brought through an administrator as the statutory trustee of the entire group of beneficiaries. If dependents electing to assign are members of the class of next of kin, but not all of the members of that class, their assignment will be effective to the extent of their beneficial interest and no farther, and the carrier, like any other beneficiary, must prosecute through the administrator as the statutory trustee, and may compromise or release its own interest, but no other."

It must be conceded that if the employer is given the right to maintain the action by virtue of the assignment emanating from the widow, the appellant (father) will be excluded from receiving his propor-

tionate share of the proceeds as a next of kin which he is entitled to under Section 380 of the District of Columbia Code. It must be conceded further that as a dependent under the District of Columbia Compensation Act the appellant (father) will receive only a meager, if any portion of the said recovery against the wrongdoer. This is predicated under clauses (1), (a), (b), and (c), of paragraph (e) of Section 933 of the District of Columbia Compensation Act, which in substance gives the employer the right, if he maintains the action to reimburse himself to the extent of all debts, a reasonable attorney's fee, and the present value of what it will have to pay the widow, and in almost every case, after such reimbursement, there is nothing left to be distributed among the next of kin and those dependents who elect not to obtain compensation but who prefer to proceed against the wrongdoer.

III

THE COURT ERRED IN ITS APPLICATION OF THE CASE OF THE AETNA LIFE INSURANCE COMPANY VS. MOSES, 287 U.S. 530.

The Lower Court in its opinion (62 W. L. R. 78) took the position that the decision of the Supreme Court of the United States in the Aetna Life Insurance Case (Supra) is controlling in the present case. A careful reading of the Aetna Life Insurance Case (Supra), however, will lead to a different conclusion. The Supreme Court of the United States in that deci-

sion made it clear from the very outset the grounds on which its decision was based. On pages 538, and 539 the Court spoke as follows:

“The election to accept compensation was made by the widow as she is both the administrator and the only person entitled to compensation, the election was validly exercised and we need not resolve possible doubts as to the proper person to make the election under other circumstances.”

The ruling of the lower Court in the present case assumes that the above quoted language from the Supreme Court was not for any definite purpose; however, the Supreme Court had before it at the time of the decision in the Aetna Life Insurance Case (Supra) the New York decisions quoted herein before, that the Court knew that Justice Cardozo said in the case of Zirpola vs. Casselman (Supra):

“Where all of the dependents are also all of the next of kin and elect to assign the entire beneficial interest in the cause of action against the wrongdoer pass by assignment to the carrier (employer).”

In deed it would have been useless to have the administrator maintain the action when the only distributee being the employer or the carrier.

The appellant insists that the case in question is distinguishable from the Aetna Life Insurance Case (Supra) in that in the present case the widow who accepted compensation is not the administratrix and is not the only person entitled to compensation. The

opinion of the lower Court (62 W. L. R. 78) further states "The reasoning of the opinion, however (see specially pp. 539-541), expressly referring to the New York cases and construing the peculiar and ambiguous language of our statute, concludes:

"That where the employer is given anything to recover by the language of Section 933(b) and (d) it is the full recovery provided by the wrongful death act and we do not think as the court below, that the rights thus conferred may be enforced only by an action brought in the name of the personal representative."

Is it not significant that the word "only" was used by the Supreme Court? Does it not suggest that there are circumstances where the representative may maintain the action? If it intended to imply that the employer was the only party to maintain the action it would have said so in unmistakable language.

The question presented in the Aetna Life Insurance Case (Supra) differs materially from that presented upon this appeal. This is largely true in view of the fact that on page 540 of the aforesaid opinion the Supreme Court of the United States cites with approval the decisions of the New York Court of Appeals herein-before mentioned. That Court had before it in the Aetna Life Insurance Case (Supra) a statement of facts equivalent to the first proposition laid down by Mr. Justice Cardozo in the matter of Zirpola vs. Caselman (Supra) i.e., where all of the beneficiaries were all of the next of kin. It is submitted that under such circumstances the employer has the right to maintain the action, but in the present case the facts differ materially from the facts in the Aetna Life case. This

contention is further supported in view of the closing of the opinion of Mr. Justice Stone in the Aetna Life case, when, at page 543, he said:

“ . . . nor do we consider what would be the rights of the person entitled to compensation or the personal representative or the insurer.”

At the time of the enactment of the Longshoremen's and Harbor Workers' Compensation Act as applicable to the District of Columbia, Congress knew and well expressed what rights would be assignable to the employer upon the acceptance of compensation by the person entitled to compensation, because in Paragraph (b), of Section 933 of the Act, it is provided that the acceptance of compensation shall operate as an assignment to the employer *of all of the right of the person entitled to compensation*; while in Paragraph (c), of Section 933 of said Act, it is provided where there is no one entitled to compensation, the employer by the payment of \$1,000.00 in the fund established in Section 944 of the Act, shall work as an assignment to the employer of *all of the right of the personal representative of the deceased*. It is evident that Congress did not use the term “all of the right of the person entitled to compensation” synonymously with the term “all of the right of the personal representative of the deceased.”

IV

DOES A SUBSEQUENT STATUTE PASSED BY

CONGRESS REPEAL BY IMPLICATION AN ANTICEDENT STATUTE?

Sections 1301 and 1302 of the District of Columbia Code give the personal representative of the deceased the exclusive right to maintain an action on behalf of the estate, and Section 380 of the said Code gives the father of the deceased one-half of his personalty. There is no provision in the District of Columbia Compensation Act which repeals the aforesaid sections of the District of Columbia Code.

In the case of

Washington Railway and Electric Company vs.
District of Columbia, 56 App. D.C. 134,

the Court said:

“Repeals by implication are not favored; without negative words will not repeal the particular provision of a former statute unless the two are irreconcilably inconsistent.”

See also:

Tri-State Corp. vs. Standard Car Corp, 51 App. D.C. 109.

Simmons vs. Simmons, 58 App. D.C. 158.

Charleston Corp. vs. Sinclair, 264 U.S. 543.

It was urged by the defendant below (appellee herein) that the District of Columbia Workmen's Compensation Act gives the employer the right to

maintain the action in the event, a dependent accepts compensation, that the Compensation Act gave the dependent the right of assignment by virtue of the said dependent accepting compensation. But I ask, what would be the solution to a situation where an illegitimate child of the deceased employee, under 18 years of age, who accept compensation? Would such an illegitimate child transfer to the employer any rights that were created pursuant to Sections 1301, 1302, and 1303, of the District of Columbia Code? It must be conceded that while an illegitimate child may be a proper party dependent within the meaning of the District of Columbia Workmen's Compensation Act, yet under Section 373 et seq of the District of Columbia Code, which deals with distribution to next of kin, such illegitimate child is not a next of kin and has no right that could be assigned upon his accepting compensation. So that the District of Columbia Workmen's Compensation Act could not be designed solely for the benefit of dependents. The said act does not satisfactorily cover the present situation and it is not the duty of the Court to legislate upon an omission of Congress, but it is their function to interpret the language of the statute as written by Congress.

In conclusion it is respectfully submitted that the decisions of the New York Court of Appeals offered the only justified and equitable solution to the question herein presented and it ought to be adopted by

this Court as a guide in construing the language of the District of Columbia Workmen's Compensation Act and it is therefore urged by the appellant that the judgment below be reversed.

Respectfully submitted,

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Attorneys for Appellant.

FILED OCT 1 - 1934

Harry H. Doleman

IN THE

United States Court of Appeals
For the District of Columbia

OCTOBER TERM, 1934

No. 6210

CHARLES M. DOLEMAN, Administrator of the Estate of
Robert R. Doleman, *Appellant*.

VS.

HARRY LEVINE, *Appellee*.

BRIEF FOR APPELLEE

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IN THE
United States Court of Appeals
For the District of Columbia
OCTOBER TERM, 1934

No. 6210

CHARLES M. DOLEMAN, Administrator of the Estate of
Robert R. Doleman, *Appellant*.

vs.

HARRY LEVINE, *Appellee*.

BRIEF FOR APPELLEE

This is an appeal from a judgment of the Supreme Court of the District of Columbia in favor of the defendant. The demurrer of the plaintiff to a plea in abatement filed by the defendant was overruled; and, upon the plaintiff electing to stand upon the demurrer, the suit was dismissed by the Court.

The case involves the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (U. S. C., Title 33, Chapter 18), as made applicable to employment in the District of Columbia by Act of Congress approved May 17, 1928 (D. C. Code Title 19, Chapter 2), which will hereinafter be referred to as the "Compensation Act"; and the Act of Congress approved March 3, 1901 as amended (D. C. Code, Title 21), which is the statute providing for liability for negligence causing death which will hereinafter be referred to as the "Death by Wrongful Act Statute".

STATEMENT OF FACTS

On January 3, 1933, one Robert R. Doleman, an employee of the Potomac Electric Power Company, while working in a manhole in the street at Lincoln Road and R Street, Northeast, in the District of Columbia, was struck by an automobile owned by Harry Levine and operated by one Harry Barner, sustaining injuries from which he died on the same day. Robert R. Doleman left surviving him his widow, Mary E. Doleman, his father, Charles M. Doleman, and a brother, as his heirs at law and next of kin.

The widow elected to receive compensation from Robert R. Doleman's employer, the Potomac Electric Power Company, under the Compensation Act. After she filed her claim for compensation, an award was made in her favor by the Deputy Commissioner, and she has been and is now receiving compensation from the Potomac Electric Power Company.

The father obtained letters of administration on the estate of Robert R. Doleman in the Supreme Court of the District of Columbia. Then the father, who individually alleges to have been partially dependent upon Robert R. Doleman, as Administrator filed an election under the Compensation Act to proceed against the third party (Harry Levine) alleged to be responsible for the death of Robert R. Doleman.

PROCEEDINGS IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

On November 1, 1933, Charles M. Doleman, as the Administrator of the Estate of Robert R. Doleman (hereinafter referred to as the "Administrator"),

filed a suit in the Supreme Court of the District of Columbia against Harry Levine. The declaration proceeded to state a cause of action under the death by wrongful act statute, and alleged that the defendant, acting by and through an agent, servant and employee negligently caused the death of Robert R. Doleman, and sought damages in the amount of Ten Thousand (\$10,000) Dollars therefor.

Thereafter, on November 13, 1933, the Potomac Electric Power Company (hereinafter referred to as the "employer") filed a suit in the Supreme Court of the District of Columbia against Harry Levine. The declaration proceeded to state a cause of action under the death by wrongful act statute assigned to the employer by the provisions of the Compensation Act, and alleged that the defendant, acting by and through an agent, servant and employee, negligently caused the death of Robert R. Doleman, and sought damages in the sum of Ten Thousand (\$10,000) Dollars therefor.

The defendant Harry Levine filed in each case a plea in abatement, setting forth in each plea the pendency of the other action, and in the administrator's action alleging that the cause of action was assigned by the terms of the Compensation Act to the employer, and in the employer's action alleging that by the terms of the death by wrongful act statute such an action should be brought by the administrator. The administrator and the employer, in their respective suits, each filed a demurrer to the plea in abatement. The cases came on for hearing together upon the respective demurrers and were argued and submitted to the Court. The Court sustained the demurrer to the plea in abatement in the employer's action; and overruled the demurrer to the plea in abatement in the Adminis-

trator's action. Opinions of the Court were published in 62 W. L. R. 77, 78; and are as follows:—

CHARLES M. DOLEMAN, ADMINISTRATOR, etc.
Plaintiff,

v.

HARRY LEVINE, *Defendant.*

“The plaintiff's demurrer to the plea in abatement is overruled for the reasons stated in the memorandum filed this day in *Potomac Electric Power Company vs. Harry Levine*, at Law No. 83,404.”

POTOMAC ELECTRIC POWER COMPANY, etc.
Plaintiff,

v.

HARRY LEVINE, *Defendant.*

“The following appears from the pleadings:

“Robert R. Doleman was killed January 3, 1933, while working for the Potomac Electric Power Company in a manhole in a city street, by an automobile of Harry Levine. He left surviving, his widow, Mary E. Doleman, and his father, Charles M. Doleman (see D. C. Code Sections 374, 380).

“The widow elected to receive from the employer compensation under Section 33 (a) of the Workmen's Compensation Law. The father, as administrator of his son's estate, on November 1, 1933, brought suit, Law No. 83,365, against Levine to recover damages for the death by wrongful act. Thereafter, on November 13, 1933, the employer, Potomac Electric Power Company, as assignee under Section 33 (b) of the Compensation Law, brought this suit against Levine to recover for the same cause of action, viz., the death of Doleman by wrongful act.

“To each declaration the defendant Levine has filed a plea in abatement alleging that each suit

should abate by reason of the pendency of the other. The plaintiff in each case demurred to the plea in abatement; the administrator by virtue of the Wrongful Death Act; and the employer, as assignee, under Section 33 (b) of the Compensation Law, each respectively claiming the exclusive right to maintain the action. These demurrers have been heard together.

“The administrator contends that acceptance by the widow of compensation operates as an assignment to the employer merely of her right, but does not affect the right of the father, who has not accepted compensation, to proceed as administrator against the wrongdoer. He relies upon *Zirpola v. Casselman*, 237 N. Y. 367, and *U. S. F. & G. Co. v. Graham and Norton*, 254 N. Y. 50, which hold that the New York Compensation Law does not create a new cause of action against wrongdoers other than the employer; that, while if dependents electing to assign are all the next of kin, the entire beneficial interest in the cause of action is assigned to the employer who is authorized to sue or compromise at will; yet, if the dependents so electing are not all the members of the beneficial class, their assignment will be effective only to the extent of their beneficial interest and no further, and the employer like any other beneficiary must prosecute through the administrator as the statutory trustee.

“The employer, on the other hand, contends that the District of Columbia Compensation Law differs from the New York law, and that the right of the employer under the District Law to maintain the action against the wrongdoer, where a dependent has elected to receive compensation, has been conclusively determined by the decision of the Supreme Court in *Aetna Life Insurance Co. v. Moses*, 287 U. S. 530. The administrator urges that the Moses case is clearly distinguishable from the present case, and is to be limited

to the exact situation before the Court, because of the observation therein that—

‘as she (the dependent) is both the administratrix and the only person entitled to receive compensation, the election was validly exercised, and we need not resolve possible doubts as to the proper person to make the election under other circumstances.’ (pp. 538, 539.)

“The reasoning of the opinion, however, (see specially pp. 539-541) expressly referring to the New York cases, *supra*, and construing the peculiar and ambiguous language of our statute, concludes—

‘that where the employer is given anything to recover (by the language of Section 33 (b) and (d)) it is the full recovery provided by the wrongful death act, (and) we do not think, as did the the courts below, that the rights thus conferred may be enforced only by an action brought in the name of the personal representative.

‘* * * the employer acquires the legal rights of the employee or the personal representative, subject to the qualifications imposed by the common law or the death statute to the extent that they are not inconsistent with the provisions of the Compensation Act. The Compensation Act permits him to enforce them in his own name.’ (pp. 540, 541.)

“In the present case the widow is not administratrix of the estate, but under the statute she is a dependent entitled to compensation, and, so far as the pleadings disclose, the sole dependent of the deceased, the father not being alleged to be dependent on his son at the time of the death, under section 9 (d).

“Under Section 33 (b) the rights of the widow were assigned to the employer by her acceptance

of compensation. By virtue of that assignment the employer is authorized under Sections 33 (b) and (d) to institute proceedings for recovery of damages from the person who caused the death, and, after retaining certain amounts as specified under Section 33(e) (1), is directed to pay over the excess of the recovery 'to the person entitled to compensation or to the representative,' (Section 33 (e) (1) (C) and (2)). Under the above quoted language from the Moses case, this recovery would seem to mean the 'full recovery provided by the wrongful death act.'

"In the light of the Supreme Court decision, it is, therefore, held that the employer and not the administrator is the proper plaintiff in the suit against Levine to recover damages for the wrongful death.

"The plaintiff's demurrer to the plea in abatement in this cause is accordingly sustained."

The administrator, after making an amendment to his declaration, and counsel stipulating that the plea in abatement, the demurrer thereto, and the ruling of the Court thereon should stand to the declaration as amended, elected to stand upon his demurrer to the plea in abatement, and an order was entered in that cause dismissing the suit. The administrator has noted and perfected this appeal from the decision of the lower Court.

PETITION FOR SPECIAL APPEAL

The ruling of the lower Court in sustaining the demurrer to the defendant's plea in abatement in the employer's suit was an interlocutory order; and the defendant could not stand upon his plea in abatement since the real question that the defendant was concerned with was a question of whether or not he was responsible for the alleged negligence causing the

death of Robert R. Doleman, and no issue has been joined on that question. The defendant, apprehending that, if he filed a plea in bar, the point raised by the plea in abatement might be waived, filed a petition in this Court for an allowance of a special appeal in the employer's suit, the same being Original No. 2259 in this Court. The Court denied the petition for special appeal; and the petitioner (appellee herein) filed a motion to reconsider the petition. The matter is now pending before this Court upon motion for reconsideration of the petition and allowance of special appeal.

QUESTION INVOLVED

In the event of the death of an employee in the District of Columbia under circumstances giving rise to a right of action against a third person for wrongful death, is the proper plaintiff to bring such an action the employer, who is liable and for and paying compensation to a dependent of the deceased under the provisions of the Workmen's Compensation Act, or the administrator of the estate of the deceased, under the negligence causing death sections of the Code of Law for the District of Columbia?

The Court below, in its memorandum opinion filed in *Potomac Electric Power Company, etc. vs. Levine*, Law No. 83404, and incorporated by reference in the memorandum opinion filed in this case, held that the employer and not the administrator is the proper plaintiff in the suit against Levine. The administrator is seeking upon this appeal a reversal of the decision of the lower Court, and a ruling that the administrator is the proper party to maintain the action in question.

ARGUMENT

This appellee has been named defendant in two suits for the same alleged negligent act resulting in the death of Robert Doleman. His position is that the right of action for negligence causing death is a single action, and before being put to his defense on the allegations of negligence he is entitled to a decision finally determining which of the suits he must defend. Having no preference as between the two suits filed, he filed his plea in abatement to each suit, asserting in each plea that the other suit was properly brought and that the suit in which the plea was filed should abate.

Since, therefore, by his plea in abatement in this case he asserted that the suit by the employer was the only proper and valid suit which could be brought; and since the Court below sustained this plea by its decision on the demurrer, this appellee submits herein the authorities supporting the decision of the Court below.

THERE IS ONLY ONE RIGHT OF ACTION FOR NEGLIGENCE CAUSING DEATH IN THE DISTRICT OF COLUMBIA

The right of action for negligence causing death is statutory, and was originally created by the Act of Congress of February 17, 1885 (Title 21, D. C. Code) Section 1 of this Act provides that "the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death".

The enactment of the Workmen's Compensation Law did not create a new cause of action.

The provisions of workmen's compensation laws relative to actions for injury or death of employees through negligence of persons other than the employer

have been uniformly held to refer to existing rights of action, and not to create new rights of action.

In *Hunt v. Bank Line*, 35 Fed. (2nd) 136 the Circuit Court of Appeals for the Fourth Circuit, in a case under the Longshoremen's Act, held that upon acceptance of compensation an employee could not thereafter sue the third party whose negligence caused the injury, even though the employer refused to bring such a suit, as the entire right of action passed to the employer.

In *Aetna Life Insurance Company vs. Moses*, 287 U. S. 530, the court said, on page 538:

"In the case where the employee survives and accepts compensation as the only person entitled, it is clear that the statutory assignment vests in the employer the full right to receive damages from the third person. Double recovery by the employee * * * is thus avoided."

In *Moore v. Christensen S. S. Co.*, 53 Fed. (2nd) 299, the Circuit Court of Appeals for the Fifth Circuit, in affirming a decision of the District Court denying the right of the Administrator of a deceased longshoreman to sue the third party whose negligence allegedly caused the death, said:

"It is not to be supposed that for the same injury or death two actions against the same party were contemplated, one under the state law and another under the Act of Congress."

In *Zirpola v. Casselman*, 237 N. Y. 367; 143 N. E. 222, the Court, in construing the New York Workmen's Compensation Law, states, on page 372.

"The Compensation Act did not create a new cause of action against wrongdoers other than the

employer with a new class of beneficiaries. It found a cause of action already in existence, and assuming that this cause of action would continue in the future, it fixed the extent to which the shares that belonged to the dependents should be applied in reduction of the burdens that were placed upon the carrier."

In the recent case of *Storrs v. Mech*, (Maryland, 1934) 170 Atl. 743, the Court of Appeals of Maryland, in deciding a case involving construction of the death statute and the provisions of the Workmen's Compensation Law relative to actions where an employee is killed, said:

"In other words, section 58 of Article 101 does not create any new liability, but simply designates in what manner the liability theretofore existing under the common law and Lord Campbell's Act, should be enforced, and changes the parties who might be benefited by such enforcement."

* * * * *

"There is nothing in conflict between the provisions of Article 67, 'Lord Campbell's Act', and Article 101 'Workmen's Compensation'. They both unquestionably deal with recovery for injuries resulting in death. The two statutes are in *pari materia* and must be construed together."

The opinion of the Court below assumes that there is only one action for wrongful death, and holds that the employer is the proper person to bring the suit. The appellant in his brief apparently concedes that there is but one action, and contends that the administrator is the proper person to bring the suit.

The authorities either expressly hold, or assume, that there is but one cause of action for negligence causing death, and the sole question, therefore, is who is the proper party to maintain the action.

ACCEPTANCE OF COMPENSATION BY A DEPENDENT OF A DECEASED EMPLOYEE ASSIGNS THE ENTIRE RIGHT OF ACTION UNDER THE DEATH STATUTE TO THE EMPLOYER

There being one, and only one, right of action for negligence causing death, the Workmen's Compensation Act provides that in the event of the death of an employee under circumstances giving rise to a right of action against some party other than the employer for negligence, the acceptance of compensation by the dependent of the deceased employee operates to give to the employer paying or providing such compensation the sole right to bring such action against the third party negligently causing the death of the employee.

Section 33, Workmen's Compensation Law.

In *Moore vs. Christensen S. S. Co.*, 53 Fed. (2nd) 299, the Circuit Court of Appeals for the Fifth Circuit said:

"It clearly was the intent of Congress to assign to the employer all rights of the legal representative of the deceased, and also to enumerate the classes of the beneficiaries on whose behalf recovery might be had."

It is perfectly clear that when the employee is injured, the entire right of action against the third party causing the injury is assigned to the employer by the election of the employee to take compensation.

Hunt v. Bank Line, 35 Fed. (2nd) 136.

Aetna Life Ins. Co. v. Moses, 287 U. S. 530-539.

When the employee is killed, the language of the statute is not so clear, but by reading together the various subparagraphs of section 33, it is apparent

that the Act contemplates the same result, namely, the assignment of the right of action to the employer.

The Supreme Court of the United States in the *Aetna Life Insurance Company vs. Moses* case, after discussing the various subparagraphs of Section 33, said:

“Having regard to these provisions and to the general purpose which the Act discloses with respect to rights of recovery when the injury does not result in death, we see no escape from the conclusion that the statute contemplates that the employer is to have the same control over the institution of an action for wrongful death, the compromise and settlement of the claim, and the distribution of the proceeds, as he is given in unambiguous language in the case where the injury results only in disability. What is made explicit by the statute with respect to the latter is implicit with respect to the former.”

In that opinion the Court mentioned the New York cases cited by appellant in his brief, and indicated that our statute and the New York statute differed materially, in that our section (33) (2) has no counterpart in the New York statute.

The appellant assumes in his argument that the right of action which the Compensation Act assigns to an employer paying compensation to a dependent of a deceased employee is the interest of the dependent in the estate of the decedent and that the right of action for negligence causing death is an interest in the estate of the decedent. These are erroneous assumptions. The right to compensation arises by virtue of the Compensation Act from the relationship of employer and employee, and is not an interest in the estate of the deceased employee.

The right of action for negligence is not an asset of the estate of the decedent, recovery under any such action is not subject to the debts of the decedent, and the provisions of the death act providing for distribution to next of kin do not create an interest in any estate, but merely provide a convenient method for distribution of damages. The contention of the appellant that the operation of the statute under the rule laid down in *Aetna Life Insurance Co. vs. Moses* will produce inequalities in the distribution of the proceeds of a successful suit under the death act is without merit, since the place for the correction of such inequalities, if any there be, is the Congress rather than the Courts.

It might be noted that the distribution of proceeds of suits under so-called Lord Campbell's Acts in the various states varies greatly. There is nothing particularly sacred or vested in the provisions of our statute directing distribution to next of kin, and our statute conceivably works inequitably in that it makes no provision for varying degrees of dependency between next of kin. A wealthy child secures the same distributive share as a crippled dependent child. If the Congress, or legislature, provides a different method of distribution of the proceeds of a suit under the death statute in certain classes of cases, it is entirely within the power of the legislature and the equities of such legislative action are not the subject of inquiry in this case.

Storrs vs. Mech, (Maryland, 1934) 170 Atl. 743.

CONCLUSION

In conclusion, therefore, it is respectfully submitted, first, that there is only one cause of action for negligence causing death in the District of Columbia; and, second, that the cause of action has been assigned to the employer by virtue of the Compensation Act, so that the decision of the Supreme Court of the District of Columbia in rejecting the right of the administrator to maintain the action instituted by him is correct, and should be affirmed.

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